NO. 22381

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LORIN BORCHERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.



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# APPELLEE'S BRIEF

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APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## TABLE OF AUTHORITIES CITED

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# APPELLEE'S BRIEF

## I

## STATEMENT OF JURISDICTION

On March 29, 1967, appellant was indicted in one count by the Federal Grand Jury for the Central District of California for robbery of a National Bank in violation of Title 18, United States Code, Section 2113(a) [C.T. 3]. 1/ Following a trial by jury before the Honorable Irving Hill, United States District Judge, from June 20, 1967, to June 22, 1967, appellant was found guilty.

Appellant was convicted and sentenced on September 11, 1967, to the custody of the Attorney General for twenty years and

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1/ "C.T." refers to Clerk's Transcript.

for a 90-day study as described in Title 18, United States Code, Section 4208(c) [C. T. 60].

Appellant filed, on September 12, 1967, a Notice of Appeal [C. T. 62].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

## STATUTE INVOLVED

Title 18, United States Code, Section 2113 provides in pertinent part:

> "(a) Whoever, by force and violence, or by intimidation, . . . attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association; . . . Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."
>
> "(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution

organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

## III

## QUESTIONS PRESENTED

A. Whether United States v. Wade and Gilbert v. State of California are the law to be applied in the instant case.

B. Whether the totality of the circumstances surrounding the trial deprived appellant of a fair trial.

C. Whether appellant was represented by incompetent counsel.

## IV

## STATEMENT OF FACTS

On March 15, 1967, at 2:40 P.M., teller Marie Canada, of the La Canada Branch of the Bank of America, La Canada, California, was robbed [R.T. 80], 2/ and a later audit revealed a loss of $954.00 [R.T. 110].

Prior to the robbery, on March 15, at 1:25 P.M., pro assistant cashier Marjorie Jones started her lunch period [R.T. 6]. She crossed Oakwood, a street to the side of the subject bank, and

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2/ "R.T." refers to the Reporter's Transcript.

noticed a white car parked in a northerly direction [R. T. 7]. When she returned from getting a hamburger, ten minutes later, she noticed the same car in the same place [R. T. 7]. When she went upstairs to the lunchroom, she observed, through a window, the same car parked at the curb [R. T. 7-8]. Exhibits 1, 2 and 3 are pictures of the car [R. T. 8]. From Jones' position in the lunchroom, and over a period of the ensuing 50 minutes (to approximately 2:25 P. M.), Jones observed the occupant of the car put on a hat and glasses, grin into the mirror [R. T. 34], pick up an attache case, get out of the driver's side of the car, go around the front of the vehicle, proceed in the direction of the back door of the bank, return to the car in fifteen or twenty seconds, take off the hat and glasses, and drive away [R. T. 12-13]. The occupant of the car would then return the car to the same location [R. T. 13]. He followed the same procedure three times [R. T. 13].

While Jones was in the lunchroom, Margaret Hastie was also there [R. T. 16]. Because of the unusual situation at the curb, the two ladies made written notes of the man's attire, his physical description, his car interior and exterior, and the license number of his car, NGE 890 [R. T. 16, 35].

When Jones returned to work, at 2:25 P. M., she saw the same man at Mrs. Hastie's teller window [R. T. 18]. Upon leaving the window the man looked over the officer's platform, proceeded to the front door, and there, hesitated and looked back at the tellers' area and left [R. T. 18]. After leaving the bank,

the man entered the same car that had been parked alongside the bank, and slowly pulled away in front of the bank [R. T. 20]. Jones was positive that the man at Hastie's window was the same man who had been going through the motions, vis a vis the car, earlier [R. T. 20].

Between 2:40 and 2:45 P. M., Jones saw the same man again [R. T. 20-21]. At this time he was wearing a hat, and glasses, and carrying an attache case [R. T. 21]. Jones saw the man approach the teller position of Mrs. Marie Canada, put down the attache case, and saw Canada, without counting, taking bundles of money and placing them into the attache case [R. T. 22]. At that time she told the manager, Mr. Kieffer, there was a robbery in progress and Kieffer ran out the front door of the bank as the robber was exiting through the rear door [R. T. 23, 33].

Jones identified the defendant as the man described in her testimony [R. T. 25].

Teller Margaret Hastie went to lunch on March 15, 1967, at 1:30 P. M. and watched the man in the Comet and saw the "man was acting rather peculiar" [R. T. 43-44]. She physically wrote down the following details of the man and his car: two-door white Comet with red interior, license number NGE 890, rust spots on right side, dents in front, approximately fifty years of age, medium height and weight, glasses, wearing a dark hat with a red feather [R. T. 45]. Said notes were written while Hastie was in the lunchroom [R. T. 44]. Hastie testified that Exhibits 1, 2 and 3 are pictures of the car she had seen on Oakwood [R. T. 49].

After returning from lunch, the man Hastie "had been watching outside was standing right in front of me" [R. T. 53]. The man obtained change for a twenty dollar bill, and then left in the manner previously described by the witness Jones [R. T. 53-54]. Hastie was positive that the man obtaining the change was the same as the one in the Comet [R. T. 55], except he was not wearing a hat and glasses [R. T. 56].

Approximately ten minutes passed when Hastie saw the same man entering the lobby from the rear door, wearing a hat and glasses, and carrying a black attache case [R. T. 56]. He went to the teller position of Marie Canada [R. T. 56] and put the attache case down in front of Canada [R. T. 73]. When Hastie next looked, the man was heading for the back door in a "rather hurried walk" [R. T. 57]. The same man who was at Canada's position was the same as the one in the Comet and who had cashed the twenty-dollar bill [R. T. 57]. He was also the defendant [R. T. 57].

Marie Canada testified that at 2:40 P. M., on March 15, 1967, she was held up and robbed [R. T. 80]. The robber told her not to sound an alarm or make a sound [R. T. 81]. He placed an attache case on her counter, without either side being flat on the counter, and with his left hand at the base [R. T. 83]. Mrs. Canada was, "absolutely terrified" [R. T. 84]. After identifying the defendant as the robber, Mrs. Canada testified,

"I am just positive it is the man. The whole time I was being robbed I looked right into his face,

and there isn't any doubt in my mind" [R. T. 86].

Ingrid Corey, a teller at the victim bank testified that on March 15, 1967, around closing time, the defendant said to Marie Canada, who was positioned next to her at a distance of three feet,

"If you put all your money in here you won't be hurt" [R. T. 97-100].

At the time the defendant was carrying a dark attache case [R. T. 103], wearing glasses, a dark hat with a feather, and a dark suit [R. T. 98]. Between the date of the robbery and the day before her testimony, June 20, 1967, Corey had not seen the defendant [R. T. 104-105]. Ipso facto, she did not attend any lineup.

Harold Scott Zimmerman, assistant cashier at the victim bank [R. T. 107-108], after 2:30 P. M., followed a man in a dark suit and hat, carrying an attache case, out the back door of the bank, and watched him get into a '64 or '65 Comet with license number NGE 890 [R. T. 112-117]. Zimmerman had seen the same man parked outside the bank earlier [R. T. 111-113], from the staff room [R. T. 119]. Zimmerman did not identify the defendant at trial.

Richard Kieffer, manager of the victim bank [R. T. 121-122], testified that on March 15, 1967, his attention was directed to the teller line where he saw a man in a dark suit wearing a hat [R. T. 122]. The man was holding up a teller [R. T. 123]. As the robber walked out the rear of the bank, Kieffer went out the front, and saw the robber getting into a car parked on Oakwood, adjacent

to the bank [R. T. 123]. Upon getting into the car, the robber removed his hat and glasses and drove off [R. T. 123]. At the time Kieffer made Exhibit 11, a note, which bears the following, "COMET NGE 890 - Under six feet - Brown suit - Took off hat as entered car" [R. T. 126-127]. Exhibits 1, 2 and 3 contain photographs of the same car [R. T. 124]. Kieffer saw the witness Zimmerman following the Comet as it drove off [R. T. 128]. Kieffer did not identify the defendant at trial.

George Paine, Jr., a Special Agent of the F. B. I., testified that on March 15, 1967, the appellant arrived at his home in his personal vehicle, which is pictured in Exhibits 1, 2 and 3 [R. T. 130-131]. After advising the appellant of his constitutional rights, and the defendant executed a written waiver thereof [Ex. 13, R. T. 132], the appellant stated that he had been driving a white 1965 Comet bearing California license plate number NGE 890 all day, and had not loaned it to anyone [R. T. 136]. Appellant stated during the interview that he had been to the victim bank earlier that day for the purpose of cashing a five dollar bill [R. T. 137].

Detective Monte McKennon, of the Huntington Beach Police Department, at the time of the arrest, found forty-six one dollar bills up over the left tire well of the appellant's 1965 Comet and 209 dollars in the golf sock of the number four wood [R. T. 154-155].

Following the testimony of Paine, the appellant testified. On March 15, 1967, he was driving the car described in the

previous testimony [R. T. 160]. On that date, he testified, he parked his car in the area described by the bank personnel, adjacent to the side of the bank [R. T. 162], on Oakwood [R. T. 168]. He did put on glasses in the car [R. T. 169], and was outside the bank for some time [R. T. 170]. He testified he went in the front door of the victim bank, went to the first free teller, obtained change, walked out the back door, got into his car, and changed his shoes [R. T. 170]. He testified that when he obtained the change he was wearing neither a hat or glasses [R. T. 173]. After changing his shoes he drove off [R. T. 174]. He further testified that he had the car all day [R. T. 176]; he owed money at the time of the robbery [R. T. 177-178]; he did not return after cashing the bill [R. T. 178]; he did not go in with a hat or glasses [R. T. 178]; and did not have "any encounter" with teller Marie Canada or talk to her [R. T. 178].

On cross examination, the following colloquy took place:

"Q. Were you anywhere near Marie Canada on that day?

"A. If you could say that I was anywhere near her -- if she were in the teller cage as I walked from the front of the bank to the rear of the bank, this is as close as I could have gotten to her.

"MR. MORROW: Your Honor, may I approach the exhibits?

"THE COURT: You may.

BY MR. MORROW:

"Q. Is it a fair statement to say that you walked in the front door pictured on Exhibit 8, walked up to the first teller position, which would be approximately where the "H" is, the red "H" is coming down in Exhibit 6; and from Exhibit 6 you walked out the back door, which is pictured in Exhibit 7? Is that right?

"A. Yes, sir." [R. T. 179].

Further, on cross examination, the appellant admitted that at the time of the robbery he was borrowing money for the purpose of paying interest on other loans [R. T. 180]. At the time of the robbery he had been "bouncing" checks for months [R. T. 180]. Appellant also testified that the last time he had been at the bank was ten days to two weeks prior to the 15th when he cashed the bill at Mrs. Hastie's station [R. T. 182].

After the appellant testified that he was nowhere near Mrs. Canada on the day of the robbery, rebuttal evidence proved that the appellant left his left palm print at the station occupied by Mrs. Canada [R. T. 190-191, 187, 200-204, 212-213, Exs. 15 & 16].

V

## ARGUMENT

### A. THE WADE AND GILBERT CASES ARE NOT THE LAW TO BE APPLIED IN THE INSTANT CASE.

Appellant was arrested on March 15, 1967, the evening of the subject robbery. If we are to give the slightest weight to the affidavits of appellant then he appeared in a lineup that evening. Stovall v. Denno, 388 U.S. 293 (1967), decided the same date as Wade and Gilbert, June 12, 1967, holds that the rule of Wade shall not be retroactive to lineups held prior to June 12, 1967.

### B. APPELLANT HAD A FAIR TRIAL IN THE TOTALITY OF CIRCUMSTANCES.

To paraphrase appellant, he claims that the holding of a lineup colored his entire trial to the point of denying him due process of law.

The appellee has previously admitted that appellant was not appointed counsel at the time of the lineup [C.T. 58]. However, it appears that appellant at trial was not prejudiced by the lineup. Wade held that a lineup was a critical stage of the proceedings and therefore a defendant had a right to have an attorney present for the purpose of gathering information for the purpose of attacking identifications made at trial. Initially, appellant was convicted independently of any possible lineup taint, but if

appellant's counsel believed the allegations of appellant then it appears he was in possession of sufficient material to cross examine the witnesses. Stovall states, at 301-302, that a man may demonstrate that "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."

The issue at trial was not whether appellant was on the scene at the bank on the day of the robbery. Appellant admitted it throughout his testimony. The issue was, assuming he was there, whether he did certain things. The witnesses Jones and Hastie described the robber as doing certain things prior to the robbery, namely, being parked in a 1965 white Comet on Oakwood prior to the robbery and putting on glasses, doing paper work, etc. Appellant admitted those things. Further Jones and Hastie testified the robber obtained change from Hastie at a teller position near the front of the bank. Appellant testified identically. The manager, Mr. Kieffer, and the assistant cashier, Mr. Zimmerman, testified the robber left the bank and entered a 1965 white Comet bearing California license plate NGE 890. Neither Kieffer or Zimmerman identified appellant at trial. While appellant did not admit the robber entered the same car, he did admit that he entered the same car on Oakwood and drove off. Again, we see the issue is not who but what, i.e., what appellant did, not whether it was appellant. The witness Corey, who had not seen appellant between the robbery and the day before she testified, therefore, not having attended the lineup, testified that

the appellant was the man who told teller Canada, "If you put all your money in here you won't be hurt."

Further, after appellant admitted he was in the bank he testified he was nowhere near teller Canada or her station. His left palm print, lifted from the counter in front of Canada, conclusively proved what he did. The only conclusion is that the subject of identity was not the issue but what the appellant did was the issue.

The mere fact that Jones and Hastie wrote down their notes and were able to positively state, without reference to appellant, that the man in the Comet was the same as the one who obtained change from Hastie and robbed the bank shows conclusively the independence of their testimony from any possible prejudice at a lineup.

The matters referred to in appellant's opening brief do not amount to prejudice. What appellant apparently alleges is that the others in the lineup were not "ringers" and he was required to make some statements. None of the statements alleged can be considered to be of a testimonial nature and are perfectly proper, United States v. Wade, 383 U.S. 218, 222-223 (1968).

In addition to appellant's counsel having had knowledge of the "prejudicial" events at trial, he was read the identifications made by the attendees [C.T. 57]. Assuming, arguendo, that there was a tainted lineup, appellant had everything that was needed to overcome counsel's absence at the lineup. Nevertheless, the testimony at trial, and the identification of appellant,

were based upon factors independent of the lineup. The transcript itself shows that even if the in-court identifications were tainted, there was harmless error [see Wade, at 242].

## C. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The transcript is replete with extensive and intelligent cross examination of government witnesses. The gist of appellant's instant claim is that he personally wanted more witnesses presented on his behalf. Basically, as shown by the affidavits of appellant at C. T. 30 and 39, the additional witnesses could have shown what appellant normally did on Wednesdays and what he did on the Wednesday of the trial. Additionally, appellant claims there were motive witnesses. No times are set forth that are inconsistent with the case of the prosecution. The matters that appellant "wanted" presented are irrelevant. They do not establish an alibi, but might tend to show that he went about his business after the robbery. Said witnesses would be irrelevant for the reason that normal practices cannot prove what was done at another time.

The mere fact that appellant would have, if he had represented himself, tried the case differently cannot, in any way, be considered as tantamount to showing the incompetency of his attorney. When the evidence not introduced is considered in conjunction with the prosecution's solid case, it is difficult to state

even that the wrong choice was made by trial counsel. Objections would certainly have been made to the matters appellant wanted, and in all likelihood, those objections would have been sustained.

Short of the trial being reduced to a farce, an appellate court will not grant a reversal based upon an allegation of incompetence of counsel. Sherman v. United States, 241 F. 2d 329, 336 (9th Cir. 1957).

## VI

## CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow

RONALD S. MORROW